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Nos. 92-182, 92-645

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

STEPHEN R. STEINBRINK,
ACTING COMPTROLLER OF THE CURRENCY, *et al.*,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE INDEPENDENT INSURANCE AGENTS OF AMERICA, INC., NATIONAL ASSOCIATION OF CASUALTY & SURETY AGENTS, NATIONAL ASSOCIATION OF LIFE UNDERWRITERS, AND NATIONAL ASSOCIATION OF PROFESSIONAL INSURANCE AGENTS, IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether national banks may engage in the title insurance agency business outside of the limitation established by Congress in 12 U.S.C. 92, the only statutory enactment to address the permissible scope of insurance agency activities by national banks?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF AMICI	2
INTRODUCTION AND SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THERE IS NO REASON TO ADDRESS THE CONTINUED EXISTENCE OF SECTION 92	5
A. There Is No Meaningful Conflict Between the Circuits	5
B. The Second Circuit's Ruling, in *Dicta*, and the D.C. Circuit's Ruling Regarding Section 92's Existence Do Not Create Conflicting Obligations or Rights for Any Entity	9
C. The Issue Is Currently Percolating in the Courts	10
II. THERE IS NO NEED FOR THIS COURT TO ADDRESS THE ISSUE OF THE INTERACTION OF SECTIONS 92 AND 24 (SEVENTH) OF THE NATIONAL BANK ACT	12
A. There Is No Real Conflict With Any Other Court	12
B. Petitioners' Dire Predictions of Threatened National Bank Powers As a Result of the Second Circuit's Decision Are Pure, Unfounded Speculation	14
C. None of Petitioners' Arguments That the Second Circuit's Decision Is Wrong Is Persuasive	15

TABLE OF CONTENTS—Continued

Page

III. THE ISSUES ON WHICH PETITIONERS SEEK REVIEW ARE NOT CLEANLY PRESENTED 17

IV. THE CONTROVERSY REGARDING THE INSURANCE-RELATED POWERS OF NATIONAL BANKS SHOULD BE LEFT TO CONGRESS 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases Page

American Ins. Ass'n v. Clarke, 865 F.2d 278 (D.C. Cir. 1988) 2, 14
American Fidelity Bank & Trust Co. v. Heimann, 683 F.2d 999 (6th Cir. 1982) 19
American Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992) ..... *passim*
Black v. Cutter Laboratories, 351 U.S. 292 (1956) 18
Board of Governors v. Dimension Fin. Corp., 474 U.S. 361 (1986) 19
Botany Worsted Mills v. United States, 278 U.S. 282 (1929) 8
Independent Ins. Agents of America, Inc. v. Clarke, 955 F.2d 731, *reh'g, en banc, denied*, 965 F.2d 1077 (D.C. Cir. 1992) (petitions for cert. pending) ..... *passim*
Independent Bankers Ass'n of America v. Heimann, 613 F.2d 1164 (1979), *cert. denied*, 449 U.S. 823 (1980) 12, 13
Logan County Nat'l Bank v. Townsend, 139 U.S. 67 (1891) 6
Midland Telecasting v. Midessa Television Co., 617 F.2d 1141 (5th Cir.), *cert. denied*, 449 U.S. 954 (1980) 8
National R. Passenger Corp. v. National Ass'n of R. Passengers, 414 U.S. 453 (1974) 8
Neuberger v. Commissioner, 311 U.S. 83 (1940) 16
Owensboro Nat'l Bank v. Moore, No. 91-3 (E.D. Ky. Aug. 4, 1992) (appeals pending) 2, 10, 11
Ross v. Moffitt, 417 U.S. 600 (1974) 15
Saxon v. Georgia Ass'n of Ind. Ins. Agents, Inc., 399 F.2d 1010 (5th Cir. 1968) 7, 9
Steinbrink v. Independent Ins. Agents of Am., Inc., No. 92-507 ..... 2, 5
Texas & Pac. Ry. Co. v. Pottorff, 291 U.S. 245 (1934) 5, 6, 8
United States National Bank of Oregon v. Independent Ins. Agents of Am., Inc., No. 92-484 2
Variable Annuity Life Ins. Co. v. Clarke, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.) 2, 11, 14

TABLE OF AUTHORITIES—Continued

Statutes	Page
Act of Feb. 25, 1863, Ch. 58, § 11, 12 Stat. 665	6
Act of September 7, 1916, Pub. L. No. 64-270, 39 Stat. 752	7
National Bank Act	
Section 92	*passim*
United States Code	
12 U.S.C. § 24 (Seventh)	*passim*
Ky. Rev. Stat. 287.030	10
Miscellaneous	
2 Fed. Reg. Bull. 73 (Feb. 1, 1916)	6, 7
53 Cong Rec. 11001 (daily ed. July 14, 1916)	6, 7, 9

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INTEREST OF AMICI

Amici curiae Independent Insurance Agents of America, Inc., National Association of Casualty & Surety Agents, National Association of Life Underwriters, and National Association of Professional Insurance Agents are non-profit national trade associations that represent hundreds of thousands of insurance agents and their employees throughout the United States. *Amici* are respondents in *United States National Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, No. 92-484, and *Steinbrink v. Independent Ins. Agents of Am., Inc.*, No. 92-507, which the Solicitor General has suggested should be treated the same as this case.

Amici have long maintained that their members' interest in sustaining and improving the insurance business environment is served by endorsing the separation of banking and insurance as provided under current law. In this regard, *amici* and their state affiliates have participated as parties and *amici* in numerous federal actions concerning the power of banks to engage in the business of insurance, including several cases that petitioners contend are relevant here. *See Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D.Ky. Aug. 4, 1992) (appeals pending); *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal pending*, No. 92-2010 (5th Cir.); and *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

Amici fully support the arguments presented by Respondents and submit this brief to supplement those arguments.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In its decision below, the United States Court of Appeals for the Second Circuit unanimously held that na-

[1] All the parties to this action have consented to the filing of this *amicus* brief in support of Respondents. Their letters of consent have been lodged with the Court.

tional banks are not empowered by the National Bank Act (the "Act") to act as agents for insurance companies in the sale of title insurance. *American Land Title Ass'n v. Clarke*, 968 F.2d 150 (2d Cir. 1992) ("*ALTA*"). The court ruled that Section 92 of the National Bank Act limits national banks' incidental powers under Section 24 (Seventh) of the Act. The Court concluded that "the language of Section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents." *Id.* at 155. The Court further concluded that the contemporaneous legislative history "indicate[s] that when Congress enacted Section 92, it did so in the belief that under existing banking law (specifically 12 U.S.C. § 24 (Seventh)) national banks had no authority to engage in insurance agency activities. Furthermore, the Comptroller's [1916] letter provides evidence that Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance." *Id.* at 156.

Without having received briefing or hearing argument on the issue, the Second Circuit, as a preliminary point, *sua sponte* concluded that Section 92 had not been repealed, disagreeing with the D.C. Circuit's contrary holding in *Independent Ins. Agents of America v. Clarke*, 955 F.2d 731, *reh'g, en banc, denied*, 965 F.2d 1077 (D.C. Cir. 1992) ("*IIAA*") (petitions pending). By contrast, the D.C. Circuit, sitting *en banc*, considered fully-briefed arguments on both sides of the issue before declining to vacate the *IIAA* panel's ruling that Section 92 no longer exists.[2] The D.C. Circuit's well-reasoned decision in *IIAA*, effectively endorsed by the full court sitting *en banc*, correctly resolves the issue of Section 92's continued existence.

There is no meaningful conflict on this issue. Petitioners misread the Second Circuit's decision below in assert-

[2] No member of the full D.C. Circuit court voted to rehear the panel's decision regarding the existence of Section 92.

ing that there is such a conflict. To be sure the court, in *dicta*, disagreed with the D.C. Circuit's conclusion that Section 92 does not exist. But the key to the court's reasoning is that Section 92 was *enacted* in the first instance—a conclusion that no one challenges. Having enacted Section 92, Congress made clear its view that Section 24 (Seventh) does not provide for any insurance powers. The subsequent history of Section 92—whatever it is—sheds no additional light on the meaning of Section 24 (Seventh). Thus, the Second Circuit's decision below would be no different even if it had concluded that Section 92 was repealed. Moreover, the issues presented to the two courts, and the court's holdings, are very different. No one is subject to conflicting directives as a result of the two decisions. Further, the question of Section 92's continued existence may arise in two other Circuits and there is no need to address the issue now.

Nor does that portion of the Second Circuit's reasoning concerning the interaction of Section 92 and Section 24 (Seventh) warrant review by this Court. Contrary to petitioners' assertions, there is no real or direct conflict with the decisions of other courts; the reasoning is consistent with the language and legislative history of the Act; and the decision does not threaten national banks' previously-authorized insurance-related activities.

Petitioners' belief that national banks should be permitted to engage in a wide range of non-banking activities—including the sale of title insurance—should be addressed to Congress. This Court is not the forum for effectuating policy changes.

ARGUMENT

I. THERE IS NO REASON TO ADDRESS THE CONTINUED EXISTENCE OF SECTION 92.

The Chase Manhattan Bank, N.A. ("Chase") alone requests review of the Second Circuit's conclusion that Section 92 of the National Bank Act continues to exist. The Solicitor General, on behalf of the Office of the Comptroller of the Currency ("Comptroller"), pointedly refrains from raising that issue here, asking this Court instead to review the D.C. Circuit's ruling in *IIAA*. *Steinbrink v. Independent Ins. Agents of Am., Inc.*, No. 92-507. The issue does not warrant this Court's review in either case.[3]

A. There Is No Meaningful Conflict Between the Circuits.

Contrary to petitioners' representations, there is no meaningful conflict between the Second Circuit and the D.C. Circuit. The Second Circuit's conclusion below was *dicta*: the court need *not* have resolved the issue of Section 92's continued existence in order to conclude that national banks are not empowered to act as agents for title insurance companies. It is the *enactment* of Section 92 that evinces Congress' intent to limit national banks' power to sell insurance. Its subsequent history, however construed, cannot change this conclusion. Regardless whether Section 92 exists or not, national banks are not permitted to engage in the sale of title insurance as agents for insurance companies. For that reason, there was no necessity for the court to decide whether Section 92 had been repealed.

It is well-established that national banks are limited to those activities authorized them by law. *E.g.*, *Texas &*

[3] *Amici*, respondents to the petitions seeking review of the D.C. Circuit's decision in *IIAA*, will more fully address the reasons why review of this issue is not warranted in their opposition brief in *IIAA*. That brief is due to be filed on November 21, 1992.

Pac. Ry. Co. v. Pottorff, 291 U.S. 245, 253 (1934); *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67, 73 (1891). Congress enacted the predecessor of Section 24(Seventh) in 1863. Act of Feb. 25, 1863, Ch. 58, § 11, 12 Stat. 665, 668. Like the current version, the statute identified a series of express powers, and included the provision of "incidental" and "necessary" powers. *See* 12 U.S.C. § 24 (Seventh).

In 1916, then-Comptroller of the Currency, John Skelton Williams, wrote a letter to the Senate Banking and Currency Committee requesting that national banks located in small towns be permitted to act as insurance agents. 53 Cong. Rec. 11001 (daily ed. July 14, 1916).[4] The Comptroller expressed a desire to find a statutory mechanism whereby "the powers of small national banks might be *enlarged* so as to provide them with additional sources of revenue and to place them in a position where they could better compete with local State banks and with companies which are sometimes authorized under the law *to do a class of business not strictly that of commercial banking*." *Id.* (emphasis added). The Comptroller stated, however, that "from the standpoint of public policy and banking efficiency this authority should be limited to banks in small communities." *Id.* Accordingly, the Comptroller proposed an amendment to the National Bank Act. Explicitly noting that national banks were conferred "incidental" and "necessary" powers, Comptroller Williams explained that his proposed amendment was nevertheless required because "[n]ational banks are not given either expressly or by necessary implication the power to act as agents for insurance companies." *Id.*[5] Comptroller Wil-

[4] The letter was entered into the congressional record by Senator Owens.

[5] This view conformed with the opinion of the Board of Governors of the Federal Reserve, which held in 1915 that national banks had no authority, express or implied, to engage in insurance agency activities. The Board ruled that "[a]ny such *extension* of the powers of national banks must be left to the consideration of Con-

liams therefore clearly understood that a national bank's acting as agent for an insurance company was *not* an "incidental power . . . necessary to carry on the business of banking." *Id.*

In response, Congress enacted Comptroller Williams' proposed amendment. Act of September 7, 1916, Pub. L. No. 64-270, 39 Stat. 752-53 (the "1916 Act"). The critical language of the 1916 Act, provides:

> Section fifty-two hundred and two of the Revised Statutes of the United States [Section 13 of the Federal Reserve Act of 1913] is hereby amended so as to read as follows: . . .
>
> "That *in addition to the powers now vested by law in national banking associations* organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; . . . ." (Emphasis added).

As the Fifth Circuit has recognized, prior to enactment of Section 92, "no national bank possessed *any* power to act as insurance agents." *Saxon v. Georgia Ass'n of Ind. Ins. Agents*, 399 F.2d 1010, 1016 (5th Cir. 1968) (emphasis in original). By its explicit *addition* to national

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gress." 2 Fed. Reg. Bull. 73, 74 (Feb. 1, 1916) (emphasis added). At the time—as now—national banks were granted the power "[t]o exercise . . . all such incidental powers as shall be necessary to carry on the business of banking." *See id.* at 73.

banks' powers, Section 92 constituted the sole source of authority for national banks to engage in insurance-agency activities.[6] Section 92 was thought necessary precisely for the reason that, as was universally understood, national banks otherwise had neither the express nor incidental power to sell insurance. Section 92 thus reflects Congress' understanding that insurance-agency powers were beyond the powers conveyed by the other provisions of the National Bank Act—including the grant of "such incidental powers as shall be necessary to carry on the business of banking." *See Texas & Pac. Ry. Co. v. Pottorff*, 291 U.S. at 258 & n.13 (amendment to National Bank Act to provide limited power to pledge assets to secure deposits "indicates that Congress believed that the original act had not granted general power to pledge assets to secure deposits") (citing legislative history similar to that of Section 92).[7]

In 1918, as the D.C. Circuit correctly ruled in *IIAA*, Congress repealed Section 92. Section 92 is the only statutory enactment that has ever addressed the insurance agency powers of national banks. The effect of Congress'

[6] *See Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."); *National R. Passenger Corp. v. National Ass'n of R. Passengers*, 414 U.S. 453, 458 (1974) (same); *Midland Telecasting v. Midessa Television Co.*, 617 F.2d 1141, 1145 n.7 (5th Cir.) ("The existence of a specific [statutory] exemption covering certain acts is evidence that Congress did not intend to grant immunity to other acts not covered by the explicit exemptions."), *cert. denied*, 449 U.S. 954 (1980).

[7] The Court noted in *Pottorff* that the fact that Congress enacted the limited power in a separate section, rather than as an amendment to Section 24(Seventh), indicates that Congress did not mean merely to clarify that the power of a national bank to pledge its assets to secure deposits was contained in the grant of "incidental" powers. 291 U.S. at 259. Similarly, the enactment of the limited insurance-agency authority in a separate statutory provision (Section 92) refutes any suggestion that it was merely a clarification of powers already conferred by Section 24(Seventh).

repeal of Section 92 is thus plain: there is no longer *any* authority for national banks to sell insurance. The repeal of Section 92 reinforces Congress' intention to deprive national banks of even the limited authority to sell insurance in small towns that it briefly permitted from 1916 to 1918. Congress thus reinstated the law as it existed prior to Section 92's enactment: "no national bank possesse[s] *any* power to act as insurance agents." *Saxon*, 399 F.2d at 1016 (emphasis in original).

Yet the Comptroller, in his decision at issue in this case, has authorized national banks to engage in this very activity. He has authorized Chase to act as agent for title insurance companies. This is precisely the power once permitted (in small towns only) that Congress rescinded in 1918. As Comptroller Williams recognized 75 years ago, "the Comptroller of the Currency has no right to authorize or permit a national bank to exercise powers not conferred upon it by law." 53 Cong. Rec. 11001 (daily ed. July 14, 1916).

Thus, contrary to petitioners' assertions, even if this Court were to grant review and determine that the Second Circuit incorrectly ruled on Section 92's continued existence, that determination would not alter the outcome of the Second Circuit's decision.

B. The Second Circuit's Ruling, in *Dicta*, and the D.C. Circuit's Ruling Regarding Section 92's Existence Do Not Create Conflicting Obligations or Rights for Any Entity.

In *IIAA*, these *amici* challenged the Comptroller's ruling permitting the United States National Bank of Oregon to sell insurance from its office located in a town of less than 5,000 to customers located throughout the United States, pursuant to Section 92 of the National Bank Act. *Amici* argued, in *IIAA*, that a national bank's insurance-agency activities must be confined to the "small town" in which it is located. The D.C. Circuit held that

Section 92 no longer exists. Because the Comptroller had cited no other authority for its challenged ruling, the court concluded that the ruling was not in accordance with law. 955 F.2d at 739. That is, the D.C. Circuit held that the Comptroller cannot invoke Section 92 as a source of authority to permit national banks to sell insurance from "small towns."

By contrast, the decision below presents and addresses only the narrow issue of national banks' authority to sell title insurance. The Second Circuit held that, given Section 92, the Comptroller cannot invoke Section 24 (Seventh) as a source of authority to permit national banks to sell title insurance from offices that are not located in small towns.

The two decisions address very different issues. And the two holdings concern entirely different topics. Accordingly, neither the Comptroller nor any other entity is subject to conflicting directives from or accorded different rights by the two courts.

C. The Issue Is Currently Percolating in the Courts.

In contrast to the Second Circuit's decision below, the issue of Section 92's continued existence is squarely presented in a case currently pending before the Sixth Circuit. In *Owensboro Nat'l Bank v. Moore*, three national banks with small town offices, invoking Section 92 of the National Bank Act, sought to be licensed to sell insurance in Kentucky. When they were denied license applications, the national banks brought suit against the Kentucky Commissioner of Insurance and Department of Insurance, alleging that Section 92 pre-empts Ky. Rev. Stat. 287.030, which the Commissioner had interpreted as prohibiting any bank—state or national—from being licensed to sell insurance in the Commonwealth. While cross-motions for summary judgment were pending, the D.C. Circuit's decision issued in *HAA* and the district court asked the parties to brief the issue of Section 92's continued existence. Before the court reached its decision, the Second Circuit

issued its opinion below. The district court eventually concluded that Section 92 exists, expressly adopting the Second Circuit's analysis, and held that Section 92 pre-empts the more restrictive Kentucky law. *Owensboro Nat'l Bank v. Moore*, No. 91-3 (E.D.Ky. Aug. 4, 1992).

Amici's Kentucky affiliates, intervenor-defendants in the case, and the state defendants have appealed to the Sixth Circuit.[8] One of the issues on appeal is the existence of Section 92. If the Sixth Circuit rules that Section 92 was repealed, the non-existent statute cannot then pre-empt any state law and the district court's decision will be reversed. Such a holding, in contrast to the Second Circuit's decision below, will *directly* address the powers of national banks pursuant to Section 92, and will be consistent with the D.C. Circuit's holding in *IIAA*.

If, on the other hand, the Sixth Circuit affirms, it will hold that the national banks are entitled to sell insurance pursuant to Section 92. That holding—*unlike* the decision below—will directly conflict with the D.C. Circuit's decision in *IIAA*.

At a minimum, this Court should await the decision of the Sixth Circuit, which may provide clarification and additional assistance to this Court in considering whether there is a need to address the issue of Section 92's continued existence.[9]

[8] The United States is appearing as an intervenor-plaintiff in the case.

[9] The issue may also arise in a case currently pending before the Fifth Circuit. *Variable Annuity Life Ins. Co. v. Clarke*, No. 92-2010 ("*VALIC*"). *VALIC* concerns the Comptroller's ruling that national banks may sell annuities pursuant to Section 24(Seventh). Appellant has argued that the Fifth Circuit should follow its decision in *Saxon* and the Second Circuit's reasoning here and hold that Section 92 restrains the "incidental" insurance powers of national banks. Before reaching this issue, the Fifth Circuit, like the Second Circuit, may feel compelled to address the question of Section 92's continued existence.

II. THERE IS NO NEED FOR THIS COURT TO ADDRESS THE ISSUE OF THE INTERACTION OF SECTIONS 92 AND 21 (SEVENTH) OF THE NATIONAL BANK ACT.

Both the Solicitor General and Chase ask this Court to review a portion of the Second Circuit's *reasoning* below—the court's determination that "[S]ection 92 impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general." 968 F.2d at 156.[10] Petitioners claim that the Second Circuit's reasoning conflicts with the decisions of other Circuit Courts; that the reasoning is erroneous; and that it "calls into question a variety of activities performed by national banks." OCC Pet. 9. As Respondents make clear, all of petitioners' claims are wrong. *Amici* fully embrace Respondents' arguments and offer the following additional points.

A. There Is No Real Conflict With Any Other Court.

The Second Circuit addressed a narrow issue of first impression: whether national banks are empowered to act as agent in the sale of title insurance. Other than the district court in the same case, no other court before or since has addressed this issue. Thus, there can be no direct conflict with the Second Circuit's holding.

Petitioners do not seek review of the Second Circuit's narrowly confined holding. Rather, they seek review of a more amorphous portion of the court's *reasoning* in reaching its decision, contending that it "conflicts" with the reasoning of other courts. But the purported disagreement in reasoning does not warrant this Court's review.

In contending that the Second Circuit reasoning conflicts with the decision of the D.C. Circuit in *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164

[10] The court went on to inquire "whether this prohibition applies to title insurance activities in particular." *Id.*

(1979), *cert. denied*, 449 U.S. 823 (1980), petitioners misrepresent the *Heimann* court's reasoning and ruling.[11] That case concerned bankers' challenge to a Comptroller regulation preventing insiders of national banks from benefitting personally by the regular receipt of credit life insurance income sold to borrowers of such banks. Plaintiffs alleged that the regulation, by approving various methods which enable national banks to sell credit life insurance, violated Section 92. The D.C. Circuit disagreed: "[u]nlike other forms of insurance coverage . . . credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business whether written in a town of over or under 5,000 inhabitants." *Id.* at 1170. That is, the *Heimann* court concluded that credit life insurance does not fall within the ambit of Section 92.[12] This reasoning is not irreconcilable with the Second Circuit's view that, when national banks' insurance-related activity does come within the meaning of Section 92, Section 92 constrains that activity.

As the *Heimann* court stated with regard to *Saxon*, *Heimann* is "simply not in point" here. 613 F.2d at 1170. The case before the Second Circuit had nothing to do with credit life insurance, and the court carefully distinguished the *Heimann* decision. Therefore, petitioners cannot plausibly contend that the *Heimann* case would have come out differently under the Second Circuit's reasoning. Even if there were a clear disagreement between the courts as to the effect of Section 92 on national banks'

[11] This is the only "conflict" the Solicitor General identifies. Chase strains to find other purported "conflicts."

[12] In a footnote the Court stated that "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Id.* at 1170 n.18. But, contrary to petitioners' suggestions, the court did *not* go on to hold—even in *dicta*—that Section 92 does not *impliedly* bar national bank insurance-agency activities outside small towns.

insurance-agency powers pursuant to Section 24 (Seventh) —and there is not—it has no practical impact.

Nor, contrary to Chase's suggestion, is there any conflict with the reasoning of the D.C. Circuit in *American Ins. Ass'n v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988), in which the court upheld the Comptroller's ruling that national banks may use standby credits to insure municipal bonds pursuant to Section 24 (Seventh). Section 92 is not even mentioned in the court's decision. Rather, after expressly reserving the question whether the product at issue "meets the legal criteria for insurance under various regulatory schemes," *id.* at 280, the court concluded that the sale of this sort of "municipal bond insurance" was "within the business of banking" because it was the functional equivalent of issuance of standby letters of credit.

And in *Variable Annuity Life Ins. Co. v. Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991) (appeal pending), the district court upheld the ruling of the Comptroller that fixed and variable annuities constitute "financial investment instruments" and not "insurance" for purposes of the National Bank Act, and that therefore national banks are permitted to sell annuities pursuant to their Section 24 (Seventh) "incidental powers." If, in fact, annuities are not "insurance" (a point with which *amici* disagree), it is not clear that their sale by national banks would be threatened by the Second Circuit's view of Section 92. In any event, the Fifth Circuit has yet to review the case.

B. Petitioners' Dire Predictions of Threatened National Bank Powers As a Result of the Second Circuit's Decision Are Pure, Unfounded Speculation.

Perhaps because they recognize that the practical impact of the Second Circuit's decision is minimal,[13] peti-

[13] The Court held only that national banks located in towns with populations exceeding 5,000 may not sell title insurance. Neither petitioner suggests that there are large numbers of such banks selling or intending to sell title insurance or that such sales produce substantial profits for the banks. The Second Circuit's decision does not upset well-settled expectations.

tioners contend that the decision "calls into question the ability of national banks to sell a host of other products they have long offered to their customers." OCC Pet. 17. But petitioners offer nothing short of speculation as to how a future, unknown court might or might not rule on an as-yet-unmounted challenge to national bank activity other than that involved in this case. Certainly nothing in the Second Circuit opinion calls into question these other activities; the court did not command that any of the previously-authorized activities be ceased. To the contrary, to the extent the court discussed "insurance-related" activities other than the sale of title insurance, the court was careful not to disagree with the *Heimann* court's conclusion that national banks may sell credit life insurance.

If the Second Circuit decision does engender "uncertainty" in the future about other national bank activities, there will be opportunity for this Court to address the problem *when it arises*. The Court should not expend its limited resources to reach out to address a contingency that may never occur.

C. None of Petitioners' Arguments That the Second Circuit's Decision Is Wrong Is Persuasive.

Without a real and direct conflict, petitioners resort to asking this Court to sit as a court of error and correct what they view to be the Second Circuit's erroneous decision. Not only have they miscast this Court in that role, *see Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974), but their arguments are meritless.

Contrary to petitioners' contention, Congress' use of the introductory phrase "in addition to" is entirely consistent with the Second Circuit's reasoning. The phrase demonstrates that insurance-agency activities were "in addition to" the powers granted by Section 24(Seventh), which cannot, therefore, include insurance-agency activities. In-

deed, petitioners can make their statutory language argument only by separating it from their discussion of the legislative history of Section 92. That history conclusively demonstrates that the 1916 Congress had precisely the understanding echoed by the Second Circuit—that Section 92 was needed to confer insurance-agency powers "in addition to" the powers granted by Section 24(Seventh) because Section 24(Seventh) does not permit the exercise of *any* insurance-agency activities. *See supra* at 6-8 (discussing legislative history). By splitting their discussion of the statutory language and the legislative history, petitioners distort both.[14]

Focussing on a much narrower issue, the Solicitor General tries to perform a verbal sleight-of-hand with his argument that the phrase "agent for any fire, life or other insurance company," demonstrates that Section 92 addresses, at the most, only the sale of "broad forms of insurance." OCC Pet. 13-14. The Solicitor General appears to equate the term "other" with "broad"—a word that appears nowhere in the statute or the legislative history, and whose meaning he does not define in this context.[15] But there is no linguistic or logical relation

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[14] The above discussion exposes the fallacy of petitioners' argument that the Second Circuit "misused" the principal of statutory construction, *expressio unius est exclusio alterius*. The Solicitor General notes that the principle "can never override clear and contrary evidence of Congressional intent." *Neuberger v. Commissioner*, 311 U.S. 83, 88 (1940). But the only expression of congressional intent—the legislative history—is entirely consistent with the Second Circuit's ruling. And the "in addition to" introductory language, at a minimum, does not demonstrate that the Second Circuit was *clearly* wrong.

[15] The Solicitor General seems to draw a distinction between "broad" forms of insurance and "more specialized forms of insurance." OCC Pet. 13. But—other than asserting that title insurance falls into the later category—he makes no attempt to give a reasoned explanation of this distinction or explain how a court might go about discerning the difference in a given case.

between the two terms. "Other," as used in Section 92, means simply any form of insurance company *other* than one that provides fire or life insurance. A title insurance company clearly meets that definition.

Neither Chase nor the Solicitor General presents a coherent interpretation of the National Bank Act. The Solicitor General contends that "[n]o party has argued that the power of national banks to engage in insurance agency activities incidental to the business of banking under Section 24(Seventh) authorizes banks to engage in an unlimited insurance agency business." OCC Pet. at 15. But he offers no clear vision of precisely what insurance-related activities *are* authorized by Section 24(Seventh) and how those powers could be reconciled with Section 92's limited authorization. *See also supra* n.15. Chase's attempt to distinguish large town banks' inability to engage in "the full range of general insurance agency activities authorized by section 92" from their purported ability to engage in "specific insurance agency activities that are incidental to banking under section 24(Seventh)" fairs no better. Chase Pet. 23. Chase, like the Solicitor General, is reaching for a result, not presenting a consistent legal theory.

III. THE ISSUES ON WHICH PETITIONERS SEEK REVIEW ARE NOT CLEANLY PRESENTED.

There are many issues buried in this case, and petitioners disingenuously suggest that this Court can meaningfully address the questions they present for review. The *first* issue is whether Section 92 was repealed in 1918; this was decided by the D.C. Circuit, and ruled on in *dicta* by the Second Circuit, but is currently before both the Fifth and Sixth Circuits. The *second* issue is whether Section 92, if in existence, constitutes a limitation on Section 24(Seventh); this issue was decided by the Second Circuit, but is currently pending before the

Fifth Circuit in *VALIC*, where the rule was first enunciated in *Saxon*, and the court may or may not adhere to the *Saxon* reasoning. The *third* issue is whether Section 92, even if repealed, constitutes a limitation on Section 24 (Seventh) as a result of its initial passage; the Second Circuit did not reach this issue, which is presented to the Fifth Circuit in *VALIC*, but would have to do so if this Court were to grant review and reverse the Second Circuit's conclusion that Section 92 still exists. *See supra* at 5-9. The *fourth* issue is whether, standing alone, Section 24(Seventh) can be interpreted to permit any insurance activities as "incidental and necessary" to banking and, if so, what activities, including the sale of title insurance, does it permit; this issue was presented to the Second Circuit below, but it concluded that it need not reach the question. *ALTA*, 968 F.2d at 157.

As noted above, even if this Court were to grant review and conclude that Section 92 had been repealed, Section 92's enactment must nonetheless be construed as limiting the authority of Section 24(Seventh)—a conclusion which does not alter the result below. Even if this Court were to conclude that Section 92 poses no such limitation, whether in existence or not, that conclusion still would not mean that the decision below must be reversed. Rather, the court below would go on to determine whether "the general grant of power contained in Section 24(Seventh) [is] sufficiently broad to encompass the title insurance agency business." *ALTA*, 968 F.2d at 157. In short, even if this Court were to grant the petitions and rule entirely in petitioners' favor, that decision would not resolve this case. *See Black v. Cutter Laboratories*, 351 U.S. 292, 297-98 (1956) ("This Court . . . reviews judgments, not statements in opinions.").

IV. THE CONTROVERSY REGARDING THE INSURANCE-RELATED POWERS OF NATIONAL BANKS SHOULD BE LEFT TO CONGRESS.

In the end, both Chase and the Comptroller disagree, *as a matter of policy*, with the restrictions placed on national banks' insurance-related powers by Congress as interpreted by the Second Circuit's decision. Chase's petition demonstrates precisely why this controversy should be left to Congress. Chase argues that the result below is unfair because national banks would be left at a competitive disadvantage vis-a-vis state financial institutions. Chase Pet. 25. Chase contends that it should be granted existence of the dual banking system.[16] Similarly, Chase argues that "[t]he increasing competition posed by nonbank financial institutions to the banking industry dictates that national banks not be judicially restrained from exercising the full range of their statutory powers." Chase Pet. 25. Chase contends that it should be granted the power to sell title insurance in order to enable it "to compete profitably in today's extremely competitive financial services marketplace." *Id.* 26.

Arguments about competitive advantages for and profitability of national banks should be presented to Congress, not this Court. Although the Comptroller and Chase might wish that national banks had been given a broader grant of authority, their remedy is to seek congressional action, rather than asking this Court to make policy. *See Board of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364 (1986) (holding that it is for Congress, not the agency or courts, to remedy any perceived fault with federal statute).

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[16] "Ours is a dual banking system in the sense that state and national banks have existed side by side and in direct competition with each other for many years." *American Fidelity Bank & Trust Co. v. Heimann*, 683 F.2d 999, 1000 (6th Cir. 1982).

CONCLUSION

Amici agree with the Solicitor General that the petitions in this case and in *IIAA* should be treated similarly: The petitions for writ of certiorari should be denied in both cases.

Respectfully submitted.

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